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COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20518

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January 28, 1980

The Honorable James T. McIntyre Jr.  
Director, Office of Management  
and Budget

Dear Mr. McIntyre:

In your letter of January 15, 1980, you requested our views on a draft bill to amend section 3109 of Title 5, United States Code, to clarify and update the system for appointment and compensation of experts and consultants and for other purposes.

The draft legislation would: (1) eliminate any reference to procuring by contract the services of individuals; (2) eliminate the requirement for each agency to have a separate statutory triggering authority before it can use the general authority; (3) increase the top pay rate to grade GS-18 in agencies otherwise subject to the classification and pay laws; (4) provide central regulatory authority and put definitions in the law.

There is undoubtedly a need for better control over the use of experts and consultants in the Executive branch as we have indicated in Congressional testimony and in our audit reports. As early as 1961, we recommended that the authority to hire consultants and experts be amended to provide greater control and uniformity. The proposed legislation would appear to be a step forward toward achieving this objective. However, we believe the likelihood of achieving the objective would be increased if certain changes and additions were made in the proposed legislation.

Definition of expert and consultant

We believe the definitions of "expert" and "consultant" in section 1 should be changed: (1) to clarify or emphasize the principal distinction between an expert and a consultant and (2) to avoid contradicting the administrative definition of expert in regards to OMB Bulletin 78-11.

The definition of expert in the proposed legislation states that "an expert usually serves in the performance of the operating functions of the agency, but may also perform advisory or consultive functions." We agree in principle with this definition, however, we believe that if

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the primary function of an expert is to perform an operating function then the definition should be changed to read: "An expert's primary function is to perform an operating function rather than to provide advisory or consulting services." This change would clarify the primary distinction between a consultant, who can only provide advisory services, and an expert. It would result in the classification of an individual as an expert or consultant according to the primary function to be performed. Such a change in the definition would not prohibit an agency from receiving advisory services from an expert but it would help to distinguish between these two types of employment.

To further distinguish between these two terms, we propose that the definition of "consultant" not contain the word "expertise". We believe the use of this word to define consultant is confusing and does not contribute to a clear distinction between a consultant and an expert. Rather we propose that the definition should read: "consultant means an individual who has certain knowledge, skills, or experience in a particular field..."

Furthermore, the results of a Senate Subcommittee on Civil Service and General Services questionnaire to various Federal agencies indicate that many agencies currently employ experts to provide advisory services only. In essence, these experts are providing advisory or consulting services similar or identical to the advisory services provided by consultants. If the definition of expert is changed as we proposed, then these individuals would be considered consultants since their primary function is to provide advisory services - not the performance of an operating function.

Another reason for making the suggested changes in these definitions is to avoid any contradiction with the definition of expert as used to implement OMB Bulletin 78-11 on consulting services. As you know, on May 22, 1979, OMB released figures on the use of consulting services by Executive branch agencies. In this memorandum, "experts" were excluded from the OMB definition of consulting services contained in the Bulletin. This was done ostensibly because "an expert is essentially a temporary employee which performs an operating function ..." as distinguished from a consultant who "is essentially an advisor and cannot perform operating functions. We believe that the results of the Senate Subcommittee questionnaire on consultants clearly indicate that some agencies employ experts only as advisors who do not perform operating functions.

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It is inconsistent for OMB to administratively exclude all experts from the definition of consulting services in OMB bulletin 78-11 while at the same time defining "expert" in the proposed legislation as a person who "also may perform advisory or consulting functions."

Other Observations

Section 1, subsection (d) would authorize OPM to prescribe regulations concerning the employment of individual expert and consultant appointments under this section. It also requires agencies to take corrective actions the Office directs in writing. We believe this requirement would be more effective if there was an additional provision that would give OPM the authority to indefinitely suspend an agency's authority to use section 3109 if the agency did not take the corrective actions recommended by OPM.

Furthermore, we believe that an amendment should be added to section 1 that would require Executive branch agencies to report to OPM at the end of each appointment the actual number of days that each expert or consultant worked and the total salary he or she received. At the present time, OPM does not have this type of information. As a result, OPM is limited in its ability to determine how frequently agencies exceed the maximum pay or length of service provisions of the law. The relatively infrequent OPM on-site evaluations do not provide the level of assurance that we believe is necessary to prevent agencies from abusing this authority. In addition, the OPM decision to delegate the hiring authority for these individuals from OPM to the agencies further justifies the need for more information on how agencies use this authority. The information on actual pay received and number of days worked would also be useful to OPM and perhaps GAO in deciding which agencies to visit for on-site evaluations of their use of experts and consultants.

Sincerely yours,

R. F. KELLER

Deputy Comptroller General  
of the United States